OEDCA DIGEST

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Office of Employment Discrimination
Complaint Adjudication

Summaries of Selected Decisions Issued by the Office of Employment Discrimination Complaint Adjudication

FROM THE DIRECTOR

The Office of Employment Discrimination Complaint Adjudication is an independent, adjudication unit created by statute. Located in the Office of the Secretary, OEDCA's function is to issue the Department's final decision or order on complaints of employment discrimination filed against the Department. The Director, whose decisions are not subject to appeal by the Department, reports directly to the Secretary of Veterans Affairs.

Each quarter, OEDCA publishes a digest of selected decisions issued by the Director that might be instructive or otherwise of interest to the Department and its employees. Topics covered in this issue include hostile environment harassment, the concept of "undue hardship" in disability accommodation cases, temporary disabilities, management's legal burden of articulating a nondiscriminatory reason for its decisions, service-connected disability ratings awarded by the VA, and "reverse age discrimination."

Also included in this issue is the sixth in a series of articles concerning frequently asked questions and answers pertaining to the rights and responsibilities of employees and employers with regard to requests for reasonable accommodation of a disability. Also included is a discussion of finding rates by EEOC's administrative judges in VA cases.

The *OEDCA Digest* is available on the World Wide Web at: *www.va.gov/orm*.

Charles R. Delobe

I

A FEW ISOLATED INCIDENTS OF ALLEGED DISCRIMINATORY CONDUCT NOT SUFFICIENT TO PROVE A "HOSTILE ENVIRONMENT" CLAIM

An employee complained that her supervisor had been harassing her because of her gender, thereby creating a hostile work environment. By way of evidence, she identified a few instances when her supervisor had discussed work-related matters with her in the presence of her co-workers.

In one incident, she claims that her supervisor entered her office, and requested a copy of her medical excuse while another employee was present. One month later, the supervisor entered her office and asked her to call him about a name-calling incident. On some other occasions, she claims the supervisor made statements about her zero sick leave balance and her workers' compensation claim in front of other employees.

After reviewing all of the evidence in the record, OEDCA agreed with and accepted an EEOC administrative judge's decision that the complainant had failed to prove her claim of discriminatory harassment. This case is especially instructive because it highlights a common misunderstanding by employees as to the legal meaning of the terms "harassment" and "hostile environment."

There was conflicting evidence as to whether all of these incidents occurred as alleged. The supervisor denied discussing these types of matters in the presence of other employees. One witness, however, did recall hearing the supervisor mention something about the complainant's sick leave balance.

Notwithstanding the conflicting evidence, the EEOC judge correctly found that, even if all of the incidents did occur as she alleged, they did not amount to hostile environment harassment in violation of Title VII of the *Civil Rights Act*. A "hostile work environment" is, according to U.S. Supreme Court decisions, one which is "permeated with 'discriminatory intimidation, ridicule, or insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'"

In order to prove such a claim, an employee must do much more than simply show a difficult or stressful work environment, or actions by supervisors or co-workers that are annoying. Instead, the employee must first present evidence of verbal or physical conduct that denigrates or shows hostility or aversion towards his or her specific racial, ethnic, or other EEO-protected group. In this case, where the employee alleged harassment because of her gender, it would require credible evidence of specific comments or conduct directly related to the employee's gender (*e.g.,* gender-related slurs, jokes, insults, *etc*.).

Second, even if there is evidence of such comments or conduct, the employee must also prove (not simply claim) that the behavior in question was so severe or pervasive that it altered employment conditions and created an abusive working environment. Infrequent or isolated comments, even if they

engender offensive feelings, do not constitute an abusive environment.

Although employees frequently allege discriminatory "harassment" in their EEO complaints, few present the type of evidence described above. In most cases, employees are simply complaining about a difficult supervisor or routine work-related matters such as duty assignments, time and attendance issues, training, discipline, performance appraisals, *etc*. Such complaints are more properly analyzed as disparate (*i.e*., discriminatory) treatment cases rather than "hostile environment harassment" cases. In other words, absent evidence of specific comments or conduct directly related to an employee's race, gender, age, *etc*., the focus will generally be on whether each specific event or personnel action complained of occurred because of discrimination, as opposed to whether there was a hostile and abusive work environment due to discrimination.

While the supervisor's conduct in this case -- assuming the incidents occurred as alleged -- might have annoyed the employee, she failed to prove that the supervisor engaged in discriminatory insult or ridicule or other similar conduct directly related to her gender. In addition, the matters of which she complained were not so severe or pervasive as to create a hostile, abusive work environment. Indeed, they were typical of routine job-related situations that employees normally encounter everyday in the workplace.

If the incidents in this case did occur as alleged, there may be reason to question the supervisor's judgment and supervisory skills. However, poor judgment displayed by a supervisor is not sufficient, in itself, to prove a claim of discrimination or harassment.

The judge also analyzed this case under the disparate treatment theory to determine if any of the specific incidents complained of were due to intentional discrimination because of the complainant's gender. The judge found no evidence, direct or indirect, to support a finding of discriminatory treatment.

II

RACE DISCRIMINATION FOUND WHERE SUPERVISOR FAILED TO ARTICULATE A LEGITIMATE, NON-DISCRIMINATORY REASON FOR LOWERING THE COMPLAINANT'S PERFORMANCE APPRAISAL

OEDCA recently accepted an EEOC administrative judge's finding of race discrimination in a case in which a head nurse was unable to explain why she downgraded the complainant's performance rating on the critical element of "patient care."

The complainant (African-American), a nursing assistant, had always received "exceptional" ratings from her former head nurse on this element of her annual performance appraisal. Other nursing staff described her as concerned about, and attentive to, patient needs. Nevertheless, her new head nurse (Caucasian) downgraded her to "fully successful" on this element, even though the complainant claims there had been no change in the way she was caring for patients.

The complainant had warned her new supervisor about poor patient care being provided by some "floaters" – nursing personnel, all Caucasian, assigned to an area on an as needed basis. Instead of looking into the matter, however, both the head nurse and the chief nurse accused her of disliking Caucasians.

Evidence in the record indicated that the head nurse began monitoring the complainant's work more closely, but did not monitor the work of the floaters, despite the complainant's warning. Moreover, the head nurse was overheard referring to the black nursing staff as "them girls." In addition, when the floaters complained to the head nurse about the complainant's attitude, the head nurse met with them to discuss their concerns.

The EEOC administrative judge concluded that the preponderance of the evidence supported a finding of race discrimination. In addition to pointing to the disparity in the way in which complaints of White and Black nursing assistants were handled, the judge noted that the head nurse failed to articulate a reason for downgrading the complainant's rating on the critical element of "patient care." This failure, in itself, would be sufficient to support a finding of discrimination.

The lesson here for supervisors is obvious. Although the supervisor did not have to "prove" that she did not discriminate, the law did require her, at the very least, to articulate the reason for her rating. Because she failed to do so, a finding of discrimination was required under EEO case law.

Management officials should never take an action that they are not fully prepared to justify with clear and specific reasons. Again, while there is no legal burden on management to "prove" that it made the right decision, failure to offer such proof will, as a practical matter, significantly increase the chances of a finding of discrimination. Of course, if management is not even able, as was the case here, to articulate a reason for its actions, such a finding will be automatic.

III

AN APPLICANT'S SEVERE BACK PROBLEMS FOUND TO BE A SERIOUS THREAT TO HIS HEALTH AND ACCOMMODATING HIM WOULD HAVE CAUSED AN "UNDUE HARDSHIP"

The complainant was tentatively selected for the position of Automotive Worker at a VA cemetery, subject to successful completion of a physical examination. That examination found degenerative disc disease, creating both spinal and foraminal stenosis. The physician imposed restrictions on lifting, prolonged standing, walking, pushing, pulling, kneeling, squatting, bending, crawling, and working on slippery or uneven walking surfaces.

Following the physical exam, the Cemetery Director and the selecting official determined that the types of restricted activities were essential to successful performance in the position in question, and that the complainant's restrictions could not be accommodated. The complainant subsequently received notification that he would not be hired.

The complainant claimed that the decision to reject him constituted discrimination due to his disability. Specifically, he claimed that the restrictions were unnecessary, and that he was fully capable of performing the essential duties of the position.

An EEOC administrative judge found, and OEDCA agreed, that the restrictions were essential, and that accommodating them would pose an undue hardship on the cemetery's activities.

Specifically, the judge found that the medical evidence, which included x-rays, CT scans, the complainant's medical history, and the testimony of the Department's physician, demonstrated that the constant twisting, bending, pushing, pulling, lifting, crawling, and walking on uneven and sometimes slippery surfaces -- activities that are inherent in the position for which he had applied – would place him at significant risk of serious injury. In fact, the physician noted that a single incident of twisting, bending, or lifting a heavy object could result in paralysis.

As for accommodating those restrictions, the judge correctly found that the only possible accommodation would be to hire an extra worker. The job entails repairing mechanical equipment used for burials. Repairs must often be accomplished in the field and on short notice. When a burial is scheduled, the equipment is needed, and there is no time to negotiate a repair contract. The employee must work for long periods in uncomfortable positions in order to access the part or parts in need of repair, and must frequently lift and support heavy replacement parts while installing them. The repairs must be completed quickly, so that the equipment is available when needed.

Short of hiring an extra worker, the complainant's restrictions could not be accommodated, and hiring an extra worker would have posed an undue hardship on the cemetery's operations. Contracting out some of the tasks, even if possible, would have defeated the primary purpose of having an on-site mechanic, who is immediately available and able to keep the equipment in peak operating condition.

IV

TEMPORARY USE OF A CANE FOLLOWING KNEE SURGERY NOT A DISABILITY

The complainant applied, but was not selected for, the position of Food Service Worker. He subsequently filed an EEO complaint alleging that his nonselection was due to his use of a cane.

According to the investigative record, a panel interviewed the applicants and later assigned scores based on the interviews and the applicants' qualifications. The complainant scored the lowest of all the applicants. He states, however, that during the interview, a panel member asked him if his use of the cane would cause him any problems on the job, and that he responded by saying that it would not. He believes that the question was inappropriate and that his use of the cane was the reason he was not chosen.

Management officials dispute that assertion. The person in charge of the interview panel, a food service supervisor, testified that the complainant interviewed well, as did the other applicants, but that the person selected had more experience that was directly related to the position. She also acknowledges asking the complainant about his use of a cane, and recalls the complainant stating "it was only a temporary thing because he had surgery on his knee." She denies that his use of a cane was a factor in the panel's ratings.

The selecting official, who was not on the interview panel, testified that she chose the selectee because of that individual's prior experience in the Federal government as a food service worker. She further stated that the complainant's use of a cane was not a factor in her decision, as she was not even aware that he was using a cane.

To prevail on a claim of employment discrimination, a complainant must first establish a *prima facie* case. If a *prima facie* case is established, management must articulate a legitimate, nondiscriminatory reason for its action or decision. If management articulates such a reason, the complainant must then prove by a preponderance of the evidence that the articulated reason was not the true reason, but was instead a pretext to mask a discriminatory motive.

Based on the evidence in the record, OEDCA concluded that the complainant was unable to establish even a *prima facie* case of disability discrimination, as the complainant was unable to demonstrate that he had a disability. The Equal Employment Opportunity Commission has consistently held that temporary medical conditions will generally not support a finding that an individual is disabled for purposes of the *Rehabilitation Act.*

By the complainant's own admission, his use of a cane was temporary in nature. He presented no evidence, nor did he even claim, that his knee surgery created a permanent, substantial limitation on any of his major life activities. Absent proof of a substantial limitation on such an activity, the complainant was unable to prove he was disabled; and, hence, could not prove that his nonselection was due to discrimination because of a disability.

V

EVIDENCE OF A SERVICE CONNECTED DISABILITY RATING FROM THE VA IS NOT NECESSARILY EVIDENCE OF A DISABILITY UNDER EEO LAWS AND REGULATIONS

This recent case addresses the question of whether a veteran has a "disability" under EEO law simply because the VA has awarded the veteran a disability rating due to a service-connected injury or disease.

A veteran was fired during the probationary period for tardiness, excessive sick leave, and sleeping on the job. He claimed that other employees did the same thing and were not fired, and that the real reason he was fired was because of his disability. He described his disability as a spinal condition that causes lower back pain. As evidence of

his disability, he presented proof of a 20% disability rating from the VA for thoracic lumbar strain, for which he was receiving a monthly compensation benefit. He presented no evidence, however, that this medical condition substantially limited any of his major life activities. Moreover, he never requested an accommodation for the condition before being fired.

An EEOC administrative judge found, and OEDCA agreed, that the complainant's discharge was not due to disability discrimination, mainly because complainant's medical condition did not amount to a disability under EEO law and regulations. This was so despite the fact that the VA had already categorized it as a "disability" under its disability compensation regulations.

To qualify as a disability under EEO law, an individual must show that he or she has a physical or mental impairment that substantially limits one or more major life activities, or has a record of such an impairment, or is regarded as having such an impairment.

"Major life activities" include – but are not limited to – functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. In addition to the above requirements, the impairment must generally be permanent, not temporary in nature. In some circumstances, two or more impairments that are not substantially limiting by themselves may together substantially limit the major life activity of an individual.

The VA's disability percentage ratings, on the other hand, represent the average impairment in overall earning capacity and are designed to compensate for loss of working time. Thus, to be eligible for a VA disability rating, a veteran does not necessarily have to show a substantial limitation of a major life activity (although many veterans with disability ratings obviously do have such limitations.) Instead, the veteran need only show a service-connected medical condition that, to some extent, impairs earning capacity, even though the condition may not substantially limit a major life activity, as is required by the *Rehabilitation Act* and the *Americans with Disabilities Act.*

By the same token, some veterans may not be eligible for a VA disability rating because they lack a qualifying impairment under VA's regulations, yet they could still be considered disabled under the *Rehabilitation Act*. For example, a veteran may have a record of a substantially limiting impairment, even if he or she no longer has the impairment; or may be perceived by an employer as having a substantially limiting impairment, even if he or she does not actually have such an impairment. Each of these situations would fall within the definition of "disability" under the *Rehabilitation Act,* yet not satisfy the VA's requirements for a disability rating.

Thus, the fact that a veteran has a VA disability rating does not necessarily prove that the veteran is disabled under EEO law. Any veteran with a VA disability rating who is claiming employment discrimination due to a disability must do more than simply offer evidence of a VA disability rating in order to prove the existence of a disability. He or she must generally present medical

or other evidence sufficient to show either: a medical impairment that substantially limits a major life activity, or a record of such impairment, or a perception by an employer of such impairment.

VA's EEO investigators must be alert to these definitional distinctions. Many veterans mistakenly assume that their VA disability rating is sufficient to prove they are disabled for purposes of their EEO complaint. It is, therefore, essential for EEO investigators to ensure that veterans are given adequate notice and opportunity to provide the requisite medical or other evidence showing that they have a disability, as defined by the *Rehabilitation Act*, even if the veteran has provided proof of a VA disability rating.

VI

EEOC FINDS "REVERSE" AGE DISCRIMINATION WHERE "EARLIEST DATE OF BIRTH" WAS USED AS A SENIORITY TIE-BREAKER

(Although the following cases arose at another Federal agency, we are including them in the OEDCA Digest because they involve an unusual interpretation by the EEOC of the Age Discrimination in Employment Act, of which VA managers, supervisors, and union officials should be aware.

In two nearly identical cases involving the U.S. Postal Service, the EEOC held that it is possible to discriminate between employees protected by the *Age Discrimination in Employment Act* (ADEA) — *i.e.,* employees who are 40 years of age or older — **by favoring the older employee**.

The Postal Service, in accordance with a collective bargaining agreement (CBA), used the "earliest date of birth" as a tie-breaker to establish seniority where two or more employees had the same length of service. Two younger employees, who were adversely affected by the CBA provision favoring older employees, filed age discrimination complaints. The Postal Service found no age discrimination in both cases. The Postal Service argued -- as would most employers -- that the ADEA is violated only when older employees, age 40 or over, are discriminated against in favor of younger employees.

On appeal, the EEOC rejected this argument, pointing to its ADEA regulations (29 CFR Section 1625.2(a)), which provide as follows:

> *"It is unlawful in situations where [the ADEA] applies for an employer to discriminate in hiring or in any other way by giving preference because of age between individuals 40 and over. Thus, if two people apply for the same position, and one is 42 and the other is 52, the employer may not lawfully turn down either one on the basis of age, but must make such decision on the basis of some other factor."*

The EEOC further held that it matters not that the age preference the Postal Service granted in these cases was mandated by a collective bargaining agreement. The Commission ordered the Postal Service to negotiate a new "tie-breaker" provision.

VII

FREQUENTLY ASKED QUESTIONS AND ANSWERS CONCERNING THE DUTY TO ACCOMMODATE AN EMPLOYEE'S DISABILITY

(Complaints concerning an employer's failure to accommodate an employee's disability account for a significant number of discrimination complaints filed against private and Federal sector employers. Unfortunately, this is one of the most difficult and least understood areas of civil rights law. This is the sixth in a series of articles addressing some frequently asked questions and answers concerning the reasonable accommodation requirement.

Q.1. If an employer has provided one reasonable accommodation, does it have to **provide additional reasonable accommodations** requested by an individual with a disability?

A.1. The duty to provide reasonable accommodation is an ongoing one. Certain individuals require only one reasonable accommodation, while others may need more than one. Still others may need one reasonable accommodation for a period of time, and then at a later date, require another type of reasonable accommodation. If an individual requests multiple reasonable accommodations, s/he is entitled only to those accommodations that are necessitated by a disability and that will provide an equal employment opportunity.

An employer must consider each request for reasonable accommodation and determine: (1) whether the accommodation is needed, (2) if needed, whether the accommodation would be effective, and (3) if effective, whether providing the reasonable accommodation would impose an undue hardship. If a reasonable accommodation turns out to be ineffective and the employee with a disability remains unable to perform an essential function, the employer must consider whether there would be an alternative reasonable accommodation that would not pose an undue hardship. If there is no alternative accommodation, then the employer must attempt to reassign the employee to a vacant position for which s/he is qualified, unless to do so would cause an undue hardship.

Q.2. Does an employer have to **change a person's supervisor** as a form of reasonable accommodation?

A.2. No. An employer does not have to provide an employee with a new supervisor as a reasonable accommodation. Nothing in the ADA, however, prohibits an employer from doing so. Furthermore, although an employer is not required to change supervisors, the ADA may require that supervisory methods be altered as a form of reasonable accommodation. Also, an employee with a disability is protected from disability-based discrimination by a supervisor, including disability-based harassment.

Example: A supervisor frequently schedules team meetings on a day's notice - often notifying staff in the afternoon that a meeting will be held on the following morning. An employee with a disability has missed several meetings

because they have conflicted with previously scheduled physical therapy sessions. The employee asks that the supervisor give her two to three days' notice of team meetings so that, if necessary, she can reschedule the physical therapy sessions. Assuming no undue hardship would result, the supervisor must make this reasonable accommodation.

Q.3. Does an employer have to allow an employee with a disability to **work at home** as a reasonable accommodation?

A.3. An employer must modify its policy concerning where work is performed if such a change is needed as a reasonable accommodation, but **only if this accommodation would be effective and would not cause an undue hardship**. Whether this accommodation is effective will depend on whether the essential functions of the position can be performed at home. There are certain jobs in which the essential functions can only be performed at the work site -- *e.g.,* food server, and cashier in a store. For such jobs, allowing an employee to work at home is not effective because it does not enable an employee to perform his/her essential functions. Certain considerations may be critical in determining whether a job can be effectively performed at home, including (but not limited to) the employer's ability to adequately supervise the employee and the employee's need to work with certain equipment or tools that cannot be replicated at home. In contrast, employees may be able to perform the essential functions of certain types of jobs at home (*e.g.,* telemarketer, proofreader). For these types of jobs, an employer may deny a request to work at home if it can show that another accommodation would be effective or if working at home will cause undue hardship.

Q.4. Must an employer **withhold discipline or termination of an employee who, because of a disability, violated a conduct rule** that is job-related for the position in question and consistent with business necessity?

A.4 No. An employer never has to excuse a violation of a uniformly applied conduct rule that is job-related and consistent with business necessity. This means, for example, that an employer never has to tolerate or excuse violence, threats of violence, stealing, or destruction of property. An employer may discipline an employee with a disability for engaging in such misconduct if it would impose the same discipline on an employee without a disability.

Q.5. Must an employer provide a **reasonable accommodation for an employee with a disability who violated a conduct rule that is job-related for the position in question and consistent with business necessity**?

A.5 An employer must make reasonable accommodation to enable **an otherwise qualified employee with a disability** to meet such a conduct standard **in the future**, barring undue hardship, except where the punishment for the violation is termination. Since reasonable accommodation is always **prospective**, an employer is not required to excuse past misconduct even if it is the result of the individual's disability. Possible reasonable accommodations could include adjustments to starting times,

specified breaks, and leave if these accommodations will enable an employee to comply with conduct rules.

Example: An employee with major depression is often late for work because of medication side effects that make him extremely groggy in the morning. His scheduled hours are 9:00 a.m. to 5:30 p.m., but he arrives at 9:00, 9:30, 10:00, or even 10:30 on any given day. His job responsibilities involve telephone contact with the company's traveling sales representatives, who depend on him to answer urgent marketing questions and expedite special orders. The employer disciplines him for tardiness, stating that continued failure to arrive promptly during the next month will result in termination of his employment. The individual then explains that he was late because of a disability and needs to work on a later schedule. In this situation, the employer may discipline the employee because he violated a conduct standard addressing tardiness that is job-related for the position in question and consistent with business necessity. The employer, however, must consider reasonable accommodation, barring undue hardship, to enable this individual to meet this standard in the future. For example, if this individual can serve the company's sales representatives by regularly working a schedule of 10:00 a.m. to 6:30 p.m., a reasonable accommodation would be to modify his schedule so that he is not required to report for work until 10:00 a.m.

Q.6. Is it a reasonable accommodation to **make sure that an employee takes medication** as prescribed?

A.6 No. Medication monitoring is not a reasonable accommodation. Employers have no obligation to monitor medication because doing so does not remove a workplace barrier. Similarly, an employer has no responsibility to monitor an employee's medical treatment or ensure that s/he is receiving appropriate treatment because such treatment does not involve modifying workplace barriers.

It may be a form of reasonable accommodation, however, to give an employee a break in order that s/he may take medication, or to grant leave so that an employee may obtain treatment.

Q.7. Is an employer **relieved of its obligation to provide reasonable accommodation** for an employee with a disability who **fails to take medication,** to obtain medical treatment, or to use an assistive device (such as a hearing aid)?

A.7. No. The ADA requires an employer to provide reasonable accommodation to remove workplace barriers, regardless of what effect medication, other medical treatment, or assistive devices may have on an employee's ability to perform the job.

However, if an employee with a disability, with or without reasonable accommodation, cannot perform the essential functions of the position or poses a direct threat in the absence of medication, treatment, or an assistive device, then s/he is unqualified.

Q.8 Must an employer provide a reasonable accommodation that is needed because of the **side effects of medication or treatment related to the dis**

ability, or because of symptoms or other medical conditions resulting from the underlying disability?

A.8 Yes. The side effects caused by the medication that an employee must take because of the disability are limitations resulting from the disability. Reasonable accommodation extends to all limitations resulting from a disability.

Example A: An employee with cancer undergoes chemotherapy twice a week, which causes her to be quite ill afterwards. The employee requests a modified schedule -- leave for the two days a week of chemotherapy. The treatment will last six weeks. Unless it can show undue hardship, the employer must grant this request.

Similarly, any symptoms or related medical conditions resulting from the disability that cause limitations may also require reasonable accommodation.

Example B: An employee, as a result of insulin-dependent diabetes, has developed background retinopathy (a vision impairment). The employee, who already has provided documentation showing his diabetes is a disability, requests a device to enlarge the text on his computer screen. The employer can request documentation that the retinopathy is related to the diabetes, but the employee does not have to show that the retinopathy is an independent disability under the ADA. Since the retinopathy is a consequence of the diabetes, the request must be granted unless undue hardship can be shown.

Q.9 **Must** an employer ask whether a reasonable accommodation is needed when **an employee has not asked for one**?

A.9 Generally, no. As a general rule, the individual with a disability -- who has the most knowledge about the need for reasonable accommodation -- must inform the employer that an accommodation is needed.

However, **an employer should initiate the reasonable accommodation interactive process without being asked if** the employer: (1) knows that the employee has a disability, (2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability, and (3) knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation. If the individual with a disability states that s/he does not need a reasonable accommodation, the employer will have fulfilled its obligation.

Example: An employee with mental retardation delivers messages at a law firm. He frequently mixes up messages for "R. Miller" and "T. Miller." The employer knows about the disability, suspects that the performance problem is a result of the disability, and knows that this employee is unable to ask for a reasonable accommodation because of his mental retardation. The employer asks the employee about mixing up the two names and asks if it would be helpful to spell the first name of each person. When the employee says that would be better, the employer, as a reasonable accommodation, instructs the receptionist to write the full first name when messages are left for one of the Messrs. Miller.

Q.10. **May** an employer ask whether a reasonable accommodation is needed when **an employee with a disability has not asked for one**?

A.10 An employer may ask an employee with a known disability whether s/he needs a reasonable accommodation when it reasonably believes that the employee may need an accommodation. For example, an employer could ask a deaf employee who is being sent on a business trip if s/he needs reasonable accommodation. Or, if an employer is scheduling a luncheon at a restaurant and is uncertain about what questions it should ask to ensure that the restaurant is accessible for an employee who uses a wheelchair, the employer may first ask the employee. An employer also may ask an employee with a disability who is having performance or conduct problems if s/he needs reasonable accommodation.

Q.11 May an employer **tell other employees that an individual is receiving a reasonable accommodation** when employees ask questions about a coworker with a disability?

A.11 **No**! An employer may not disclose that an employee is receiving a reasonable accommodation because this usually amounts to a disclosure that the individual has a disability. The ADA specifically prohibits the disclosure of medical information except in certain limited situations, which do not include disclosure to coworkers.

An employer may certainly respond to a question from an employee about why a coworker is receiving what is perceived as "different" or "special" treatment by emphasizing its policy of assisting any employee who encounters difficulties in the workplace. The employer also may find it helpful to point out that many of the workplace issues encountered by employees are personal, and that, in these circumstances, it is the employer's policy to respect employee privacy. An employer may be able to make this point effectively by reassuring the employee asking the question that his/her privacy would similarly be respected if s/he found it necessary to ask the employer for some kind of workplace change for personal reasons.

Since responding to specific coworker questions may be difficult, employers might find it helpful before such questions are raised to provide all employees with information about various laws that require employers to meet certain employee needs (*e.g.*, the ADA and the Family and Medical Leave Act), while also requiring them to protect the privacy of employees. In providing general ADA information to employees, an employer may wish to highlight the obligation to provide reasonable accommodation, including the interactive process and different types of reasonable accommodations, and the statute's confidentiality protections. Such information could be delivered in orientation materials, employee handbooks, notices accompanying pay stubs, and posted flyers. Employers may wish to explore these and other alternatives with unions because they too are bound by the ADA's confidentiality provisions. Union meetings and bulletin boards may be further avenues for such educational efforts.

As long as there is no coercion by an

employer, an employee with a disability may **voluntarily** choose to disclose to coworkers his/her disability and/or the fact that s/he is receiving a reasonable accommodation.

*In the next edition of the OEDCA Digest, we will discuss the concept of **"undue hardship"** -- that is, the burden on an employer to show that a specific accommodation would cause significant difficulty or expense.*

VIII

RATE AT WHICH EEOC ADMINISTRATIVE JUDGES FIND AGAINST THE VA DECLINING

With the adoption of EEOC's recent revisions to its Federal sector complaint processing regulation that give EEOC administrative judges binding decision authority, most Federal agencies were expecting a significant increase in the rate at which the EEOC judges would be finding discrimination. VA's experience thus far has been to the contrary. In fact, the finding rate for EEOC's judges in VA cases has been steadily declining.

Prior to the reorganization of VA's EEO complaint processing structure in 1998, the finding rate by EEOC judges in VA cases was approximately 15%. Since the creation of OEDCA and the Office of Resolution Management (ORM), that rate has declined significantly. In FY 1999, the first full year of operation for both organizations, the finding rate had declined to approximately 10%. Thus far in FY 2001, it has dropped to less than 4.7%.

EEOC's most recent government-wide data also show a decline in the finding rate by judges, but not as great as the decline for VA cases. In FY 1998 (the most recent data available from EEOC) the finding rate had declined to approximately 7%, down from 15% in FY 1991.

Not only has the finding rate against the VA decreased, the actual number of findings against the VA has also decreased, despite an increase over the last several years in the number of formal complaints filed. Prior to the creation of OEDCA and ORM, the VA typically received approximately 40-45 findings of discrimination per year from EEOC judges. Since the creation of these organizations, the number of such findings against the VA has dropped significantly. Thus far in FY 2001, EEOC judges have found against the VA in only 16 cases.